IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. 123.

UNITED STATES OF AMERICA, Appellant,

vs.

SHELBY IRON COMPANY, a Corporation, Organized and Existing under the Laws of New Jersey, and SHELBY IRON COMPANY, a Corporation, Organized and Existing under the Laws of Alabama, Appellees.

BRIEF AND ARGUMENT FOR APPELLEES.

CARPENTER, JOHNSTON, SHOEMAKER & HARALSON,

Attorneys for Appellees.

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SHELBY IRON COMPANY, A CORPORATION ORGANIZED UNDER THE LAWS OF NEW JERSEY, AND SHELBY IRON COMPANY, A CORPORATION ORGANIZED UNDER THE LAWS OF ALABAMA, APPELLEES.

BRIEF AND ARGUMENT FOR APPELLEES.

Statement.

Attorneys for the appellees deem it necessary to make a statement of the case for the reason that they have not received a copy of the brief for the appellant. For the same reason they are assuming that the

points to be relied on by appellant will be the same as those urged in the District Court and in the Court of Appeals.

The bill was filed to quiet title under the provisions of the Alabama Statute. Sections 9905 to 9908, inclusive, of the Code of Alabama of 1923, which were the same as those in force when the bill was filed, are as follows:

> "9905. *Person in possession of and claiming lands may file bill to clear title.*—When any person is in peaceable possession of lands, whether actual or constructive, claiming to own the same, in his own right or as personal representative or guardian, and his title thereto, or any part thereof, is denied or disputed, or any other person claims or is reputed to own the same, or any part thereof, or any interest therein, or to hold any lien or encumbrance thereon, and no suit is pending to enforce or test the validity of such title, claim or encumbrance, such person or his personal representative or guardian, so in possession, may bring and maintain a suit in equity to settle the title to such lands, and to clear up all doubts or disputes concerning the same.
>
> "9906. *Contents of Bill.*—The bill must describe the lands with certainty, must allege the possession and ownership of the complainant, and that the defendant claims or is reputed to claim some right, title, or interest in or incumbrance upon such lands, and must call upon him to set forth and specify his title, claim, interest, or incumbrance, and how and by what instrument the same is derived and created.

"9907. *Contents of Answer.*—If the defendant shall answer claiming any estate or interest in, or incumbrance upon such lands, he must, in such answer specify and set forth the title, claim, interest, or incumbrance so claimed, and if not claimed in or upon the whole of the lands, he must specify and describe with sufficient certainty, the part in or upon which the same is claimed, and the manner in which, and the sources through which such title, claim, interest, or incumbrance is claimed to be derived and created.

"9908. *Jury Trial on Demand; Decree.*—Upon the application of either party, a trial by jury shall be directed to determine the issues or any specified issue of fact presented by the pleadings; and the court is bound by the results, but may, for sufficient reasons, order a new trial thereof; and when such trial is not requested, or as to the facts for which the same is not requested, the court shall consider and determine such title, claim, interest, or incumbrance, and shall, upon the finding of the jury, or upon such consideration and determination, finally adjudge and decree whether the defendant has any right, title or interest in, or incumbrance upon, such lands, or any part thereof, and what such right, title, interest, or incumbrance is, and in or upon what part of the lands, the same exists; and such decree is binding and conclusive upon all the parties to the suit."

It was averred in the bill (Tr., pp. 1-3) that on the eleventh day of June, 1918, the Shelby Iron Company, a corporation of New Jersey, was seized and possessed

of the lands described in the bill; "that on the eleventh day of June, 1918, and June 17th, 1918, a certain deed or conveyance of all of the right, title or interest of the said Shelby Iron Company of New Jersey" in and to said lands was made and delivered to the Shelby Chemical Company, and that on the 10th day of April, 1919, the Shelby Chemical Company conveyed all of its right, title and interest in such lands to the United States of America; that the United States of America, the Complainant, had been in possession of the lands since the 23rd day of December, 1922, and that Complainant's title to the land was denied or disputed by defendants who were claiming some right or title or interest therein; that no suit was pending to test the validity of such claim, and there was a prayer for a decree that defendants had no right, title or interest in the lands. Shelby Iron Company, a corporation under the laws of New Jersey, and Shelby Iron Company, a corporation under the laws of Alabama, were made parties defendant.

The New Jersey Company answered and admitted that it was seized and possessed of the land as averred in the bill but denied that it had conveyed the same to the Shelby Chemical Company as averred in the bill. The answer stated on information and belief that on the 11th day of June, 1918, the Shelby Iron Company of Alabama conveyed to the Shelby Chemical Company a part of the real estate described in the bill and that on the 17th day of June, 1918, the said Iron Company of Alabama conveyed another portion of said real estate, but that the description of the lands in the

bill was inaccurate and did not correspond with the description in the deeds. It further averred that at the time of the making of said conveyances the Iron Company of Alabama had no title to or interest in said real estate and that by said deeds the Shelby Chemical Company acquired no title to the same and hence had no title to convey to the complainant; that defendant denied and disputed the title of complainant; that on the 1st day of October, 1890, the Iron Company of Alabama being the owner of the real estate described in the bill conveyed the same to the Alabama Coal and Iron Company, a corporation organized under the laws of the State of New Jersey, the name of which was subsequently changed to Shelby Iron Company; that defendant went into possession of said real estate under said deed and had never parted with the title to same. (Tr., pp. 3-5.) The Iron Company of Alabama in its answer disclaimed any interest in the lands and denied that it was disputing the title of the plaintiff thereto but averred that on the 11th day of June, 1918, and the 17th day of June, 1918, defendant made conveyances to the Shelby Chemical Company of the real estate described in the bill and that the bill did not accurately describe the lands so conveyed; that defendant on the 1st day of October, 1890, had conveyed all of said real estate to the Alabama Coal and Iron Company and since that time defendant had had no title to or interest in or claim upon the same.

After the filing of these answers, complainant amended its bill by making the following averment: "That on the eleventh day of June, 1918, and June 17,

1918, a certain deed or conveyance of all of the right, title, or interest to said lands mentioned in the first paragraph of the bill so made and delivered to the Shelby Chemical Company, a corporation organized under the laws of the State of Delaware, that in said conveyance, it was the true intention of the parties to convey all of right, title and interest of the Shelby Iron Company, a corporation of New Jersey, but that through mistake, or fraud, or inadvertence, said conveyance was made and executed from the Shelby Iron Company, a corporation of Alabama." The prayer of the bill was amended by asking for a reformation of the deed so as to show that it was "a conveyance by the Shelby Iron Company, a corporation of New Jersey, as was the true intent of the parties at the time the said conveyance was made by the Shelby Iron Company, a corporation of Alabama." (Tr., pp. 6-7.)

Answering the bill as amended, the New Jersey Company denied that complainant was entitled to the reformation of the deeds asked for for the following reasons: Prior to the 8th day of April, 1918, negotiations were had between the Shelby Chemical Company and defendant, which resulted in the execution of a contract between them in and by which it was recited that the Shelby Chemical Company was desirous of erecting a chemical wood distillation plant contiguous to the iron furnaces of defendant and that the charcoal produced in said plant would be delivered to defendant for use in its said furnaces; that defendant would deliver hard wood for the operation of such plant and furnish steam and water therefor and pay certain

prices for the charcoal; that defendant was to convey to the Chemical Company sufficient ground on which to erect the distillation plant. It is further recited that since the United States Government would be financially interested in the construction of the plant, such real estate might be "deeded to and vested in the United States Government during the period of a contract made between the Chemical Company and the United States Government, said contract to extend for the duration of the war"; that the contract between defendant and the Chemical Company should extend until April 1, 1923, with the right upon the part of defendant to extend it for a period of five years, and that on the termination of the contract the Chemical Company should reconvey to defendant all of the lands which were to be conveyed to it by defendant without cost to defendant and free and clear of any incumbrance or liens whatsoever, and that the Chemical Company would sell to defendant all of the improvements, equipment and other property placed on the lands by the Chemical Company; that it was further recited in said contract that the Chemical Company was about to construct such distillation plant under a contract with the United States Government by the terms of which it was to become the owner of the land, buildings, equipment and improvements, if an enabling statute to that effect should be passed by the Congress of the United States, and that the provision as to the reconveyance of the lands was subject to the obtaining of the title to said lands by the Chemical Company from the United States Government; that

the only consideration moving to the defendant for the execution of said contract on its part was the agreement on the part of the Chemical Company to deliver charcoal to the defendant for the operation of its furnaces by reason of which defendant would be able to discontinue and did discontinue and dismantle part of its then existing plant for the production of charcoal, and also the option given to defendant to purchase the plant at the termination of the contract; that shortly after the execution of the contract between defendant and the Chemical Company a contract was made between the Chemical Company and complainant in and by which it was recited that the Chemical Company had a contract "with the Shelby Iron Company of Shelby County, Alabama, according to the term of which the Shelby Chemical Company shall receive all the lumber it may require from the timber lands owned and leased by the Shelby Iron Company in return for all charcoal derived therefrom"; that the Chemical Company had offered to undertake the operation of the plant for the production of acetate of lime and methyl alcohol, provided the complainant would assume the expense of erecting the plant; that the Chemical Company would either convey or lease to the complainant a tract of land at Shelby, Alabama, for the erection of said plant; that said conveyance should be made subject to the opinion by the Attorney-General that the Government would derive an absolute title to said premises, and that the Government would have the right to expend money for the erection of improvements thereon; that the Chemical Company should proceed at once to erect

the plant which was to be paid for by complainant and used and occupied by the Chemical Company; that the entire output of the plant of lime and alcohol would be sold to complainant for the period not exceeding approximately eighteen months from the date of the contract and thereafter for the duration of the war; that on the repayment to the complainant of the cost of the plant, it would sell to the Chemical Company the plant and equipment, if it had the legal authority to do so, and that in case the complainant should take over said plant or undertake to operate it, its right to so operate it should, except as might be expressly provided by statute, cease and terminate at the end of the then existing war, and that if at that time the sale of the plant to the Chemical Company should have been consummated, the complainant would surrender possession to the Chemical Company, but that if at the termination of the war the plant was still owned by complainant, it should at its own expense within six months from the end of the war remove all buildings and equipment constituting such plant from the ground upon which the same was erected and should without further consideration reconvey such land to the Chemical Company; that a tentative draft of such contract between complainant and the Chemical Company was submitted to defendant before the execution of the contract between defendant and the Chemical Company, and that at the instance and insistence of defendant there was embodied in the said contract between complainant and the Chemical Company the stipulation requiring complainant to remove all buildings and equip-

ment constituting the plant within six months from the end of the war and to reconvey such land to the Chemical Company, if at the termination of the war the plant was still owned by complainant; that the war ended before said plant was finally completed during the year 1919, and that thereafter the plant was operated by the Chemical Company and the charcoal produced was delivered to defendant until about the 31st day of March, 1922, when the Chemical Company ceased to operate the plant which had ever since remained idle, whereby defendant had been subjected to great loss and inconvenience on account of the failure to receive such charcoal; that by reason of the fact that it had discontinued and removed a part of its former plant for the production of charcoal, and that because of the failure of the Chemical Company to manufacture and deliver charcoal to defendant, it had been unable to operate its furnaces at their full capacity and had thereby been subjected to great loss and damage; that at the time of the conveyance of the Chemical Company to complainant of the real estate, said Chemical Company did not have the legal title to the same, although three several deeds had been made, two by the Shelby Iron Company of Alabama and one by the Shelby Iron Company, without describing it as being either the New Jersey or Alabama Corporation, the property conveyed in the last named deed not being described in the bill; that although it was expressly provided in the contract between the complainant and the Chemical Company that complainant should at its own expense within six months after the end of the

war remove all buildings and equipment constituting such plant from the ground upon which the same was located and reconvey the ground to the Chemical Company, complainant had not removed said buildings and equipment; that on the 23rd day of December, 1922, the Chemical Company had surrendered possession of the plant to complainant, who had never attempted to operate the plant, and that on the 19th day of January, 1923, the Chemical Company was adjudicated a bankrupt; that the consideration moving to the defendant for the execution of such agreement with the Chemical Company had wholly failed; that the Chemical Company had disabled itself from carrying out the contract and making delivery of charcoal to defendant; that complainant had no authority to operate the plant, and that it would be inequitable to require defendant to convey the real estate to the plaintiff; that defendant had offered to purchase the plant from complainant at a fair and reasonable valuation, but that complainant had refused to allow defendant to purchase the plant and had likewise refused to remove the plant from the property of defendant; that by reason of the location of the plant in immediate proximity to the furnace plant of defendant, and that by reason of the fact that the chemical plant and furnace plant were closely intertwined and interlocked in construction, the chemical plant could not be operated by any third party without great loss and risk to defendant. It was further averred that the deed from the Chemical Company to complainant was a cloud on the title of defendant which ought to be removed, and

that defendant had no adequate remedy at law; that defendant offered to do equity by purchasing the plant from the plaintiff at its fair and reasonable value or by allowing plaintiff to remove said plant from the premises of defendant within a reasonable time to be fixed by the court and to do and perform whatever else it ought to do to entitle it to the relief thereafter prayed. It was prayed that the answer might be treated as a counter-claim, and that it might be ordered and decreed by the court that the deed from the Chemical Company to complainant should be cancelled as a cloud on defendant's title; that the possession of the premises should be delivered up by complainant to defendant within such time and on such equitable terms as might be fixed by the court; that the contract between the Chemical Company and defendant should be declared of no further force and effect and there was a prayer for general relief. This answer, which makes as exhibits thereto the contracts referred to and the deeds, is found on pages 7 to 36 of the transcript.

Complainant filed a replication to this answer in which it was averred that it was the true intent and purpose of the Shelby Iron Company of New Jersey "when said deed was executed" to convey all of its right, title and interest to the property described in the original bill. (Tr., p. 36.)

The Testimony.

On the trial of the case it was admitted between the plaintiff and defendant that the exhibits annexed to the answer to the amended bill were true and cor-

rect copies of the originals; that the said contracts between the Shelby Iron Company and the Shelby Chemical Company and between the Shelby Chemical Company and the United States of America were duly and properly executed; that the deeds annexed as exhibits were duly executed, and that as to all of the deeds made by the Shelby Iron Company it was the true intention and purpose of the parties to make the same on and in behalf of the Shelby Iron Company of New Jersey. (Tr., p. 37.) M. W. Bush testified in open court that he was the President of the Shelby Iron Company of New Jersey as well as of the Shelby Iron Company of Alabama; that at the time of the execution of the contract between the Shelby Iron Company of New Jersey and the Shelby Chemical Company, the Shelby Iron Company of New Jersey was engaged in the manufacture of charcoal iron at Shelby, Alabama, and that charcoal was the fuel used for smelting ore; that it was represented to him by the Shelby Chemical Company that the manufacture of charcoal by its distillation process would produce more charcoal and would be stronger and delivered dry; that before the execution of the contract by his company and the Chemical Company, the proposed contract between the Shelby Chemical Company and the United States of America, or the principal points of the same, were submitted to him and that he insisted on others being added; that at his instance and request there was inserted in the contract the stipulation requiring the plaintiff to remove all buildings and equipment constituting the chemical

plant within six months from the end of the war and to reconvey the land to the Shelby Chemical Company, if at the end of the war the plant was still owned by the Government; that this was before the execution of the contract between the Chemical Company and the Iron Company or the execution of any contract; that after the execution of the contract between the Chemical Company and the Iron Company, the latter dismantled part of its then existing plant and cancelled certain arrangements it then had for getting charcoal; that the Iron Company complied with its contract with the Chemical Company in every particular, going to the expense of nearly fifty thousand dollars to enable it to do so; that before executing any of the deeds a copy of the contract between the Chemical Company and the United States was furnished the Iron Company; that the chemical plant was not quite complete at the end of the war but was finally completed and that the delay in the completion thereafter was caused by the holding up of the work by the Government for several months, it having been finally completed in the latter part of 1919. After the completion, charcoal was produced by the plant and delivered to the defendant continuously until the plant ceased to be operated about the middle of March, 1922. After that time, the plant remained idle and because of the fact that the plant furnished no charcoal, the defendant had had to operate its plant on one-half time, resulting in a very heavy loss; that defendant knew nothing of the surrender of possession of the plant by the Chemical Company to the Government until after it had been

surrendered on the 22d or 23d day of December, 1922. (Tr., pp. 38-39.)

It was admitted that the Shelby Chemical Company was adjudicated a bankrupt about the 19th day of January, 1923. The witness further testified that the defendant had made an offer to buy the plant from the Government but the offer was declined first on the ground that the bid was not satisfactory and afterwards on the ground that the Government desired to sell the chemical plant at Shelby and one at Collinwood, Tennessee, at the same time and that neither would be sold separately; that the amount which defendant offered to pay to the Government was two hundred and ten thousand dollars in cash. The witness submitted photographs of the chemical plant and of the plant of the Iron Company and testified that the two plants were absolutely tied up together and that the chemical plant could not be operated separate and apart from the Iron Company's plant, except at great inconvenience, loss and disadvantage to the Shelby Iron Company; that the Chemical Company had to have steam, electrical energy and large quantities of water and waste heat from the stoves; that there were no facilities for supplying those things except through the agency of the Shelby Iron Company and there were none for switching cars except through the agency of the Shelby Iron Company; that in order to do switching it would be necessary to use the Iron Company's tracks, which would be a great disadvantage to any outside company operating through defendant's yards and would make an impossible oper-

ating proposition; that the two plants were closely intertwined and interlinked in construction, as much so as if they had been one plant; that it was so arranged for saving expense to the Government and getting efficiency by having the plants close to the boilers and blast furnaces and that a third party could only operate the chemical plant at great expense to himself and detriment to the defendant; that at the time the contract was made between the Iron Company and the Chemical Company, the Iron Company of New Jersey owned the properties and had owned them for about 27 or 28 years and also owned the blast furnaces and surrounding properties; that formerly the Shelby Iron Company of Alabama had owned them and conveyed them to the Alabama Coal and Iron Company, a New Jersey corporation, the name of which was changed to the Shelby Iron Company; that the officers of the two companies are the same and that the New Jersey Company owns the stock of the Alabama Company; that the Alabama Company has no assets and does not function in any way; that he understood the reason why the separate organization was retained was because the Shelby brand of pig iron was very valuable and it was feared that some company might be organized in Alabama under the name of Shelby Iron Company or some similar name and put out a brand of iron that would be confused with that of the Shelby Iron Company; that where it was recited in the two deeds that the grantor was the Shelby Iron Company of Alabama, he presumed it was the mistake of the attorneys drawing up the deeds; that the Shelby

Iron Company of New Jersey usually designated itself as the Shelby Iron Company of New Jersey, although the style of the name used on defendant's letterheads was Shelby Iron Company; that at the time he entered into the contract with the Shelby Chemical Company, he was authorized to do so by the Board of Directors of the Iron Company of New Jersey and was also authorized by them to transfer the property by warranty deed; that he did not discover the error in the description of the grantor in those deeds until three or four months before the trial; that the contract between his company and the Chemical Company was signed a few days in advance so the Government would sign the other contract, which the Government refused to sign unless they knew they had a source of supply; that Matthews, the president of the Shelby Chemical Company, informed him that he could not secure his contract with the Government until he had secured from defendant or someone else a contract giving a supply of wood, water, power, housing facilities, etc.; that he was informed by Matthews that the property would have to be conveyed to the Government and that he complied only on the basis that if the Government did not sell the plant, it would be reconveyed and the plant moved; that he had no dealings with the Government but that he demanded of Matthews that such provision be put into the contract; that the Government had knowledge of the contract when it was made, that it was written into the contract between the Chemical Company and the Government; that negotiations were on for some time between the Chemical Company and

the defendant for the former to buy the plant of the defendant and that during that time he informed the agent of the Government that he was not interested in the purchase of the chemical plant, but that if the Chemical Company did not buy defendant's plant, the defendant would like to consider the buying of the chemical plant; that in the contract between the Chemical Company and the defendant, the latter had the right to buy the plant or to say that it should be removed and the land reconveyed; that defendant made an offer in cash to make the Government whole by paying it two hundred and ten thousand dollars in cash, which was the balance due the Government under the contract it had with the Chemical Company to sell the latter the plant for two hundred and sixty thousand dollars of which fifty thousand dollars had been paid; that he notified General Patrick, of the Air Service, who was authorized to sell the chemical plant, that defendant would object to the sale of the property to any third party and told him the reasons why and what defendant's legal rights were; that after making the bid of two hundred and ten thousand dollars in cash, defendant was granted ten days within which to submit a revised bid, that he discussed it with General Patrick and when informed that no bid on that plant alone would be considered because the Government was going to sell the two plants together, he did not put in any further bids; that defendant never had any information or notice of the subsequent contract between the Government and the Shelby Chemical Company (which will be hereinafter referred to) prior

to the time the dispute arose, except that he had been informed by Matthews that he had bought the plant; the only information he had about the matter was from Matthews, who told him that he had bought the plant, from which he supposed that Matthews was carrying out the original agreement. (This testimony is found on pages 38 to 48, inclusive, and pages 55 to 58, inclusive, of the transcript.)

Major James A. Willis testified that he was an officer in the United States Army and was Chief of the Legal Section of the Sales Division in the office of the Assistant Secretary of War; that he had had conversations with Mr. M. W. Bush and some letters from the Shelby Iron Company relative to the purchase of the chemical plant at Shelby, Alabama; that he had told Mr. Bush that the Chemical Company was in default and that the Government proposed to take over the plant and sell it; that afterwards he was told by Mr. Bush on Monday, the 16th day of October, 1922, that he was not in a position to make any offer for the plant and that afterwards he was informed by Bush that he had arranged to sell the properties of the Shelby Iron Company and would not be interested in the purchase of the chemical plant; that after the war an adjustment of the former contract between the Shelby Chemical Company and the Government was had and the plant was sold to the Shelby Chemical Company under a contract whereby they were to pay, as he remembered, two hundred and sixty thousand dollars but the Government retained title until the purchase price should be paid; that the parties who were negotiating with Bush

for the purchase of the Iron Company's plant were also negotiating with the Government for the purchase of the Chemical Company's plant and continued for months trying to purchase it up until February, March or April of the year 1922. That the trade for the sale of the chemical plant by the Government to the Bon Air Coal and Iron Company was practically closed in February, 1922, but the contract was not signed until March; that the Government was under contract to deliver the property to the Bon Air Coal and Iron Company but had not delivered possession nor made a deed; that the Bon Air Coal and Iron Company had not paid the consideration but were prepared to pay it, as he understood. (Tr., pp. 49 to 55, inclusive.) The contract between the Government and the Shelby Chemical Company by which the chemical plant was sold to the Chemical Company under a lease sale contract, providing for the payment of fifty thousand dollars in cash and two hundred and ten thousand dollars on time, was offered in evidence and is found on pages 118 to 145, inclusive, of the transcript.

Decree.

The Court found that the defendant had a right to a reconveyance of the land to it from the Chemical Company when the contract between it and the Chemical Company terminated, which the United States was due to respect; that as the contract was terminated before its expiration through the fault or bankruptcy of the Chemical Company, the same right to a recon-

veyance would exist and that this right was available as against complainant upon either of two theories: first, if there was an equity between the defendant and the Chemical Company by which the defendant was entitled to a reconveyance of the land upon the termination of the contract, it was prior in point of time to plaintiff's equity, whether the latter arose under the original or subsequent contract between complainant and the Chemical Company; that the complainant being without the legal title, the equity prior in point of time must prevail, and, second, that complainant must be held to have contracted with the Chemical Company with notice of the Iron Company's equity to demand a reconveyance from the Chemical Company; that complainant had notice when it contracted with the Chemical Company of the terms of the contract between the Chemical Company and the Iron Company; that complainant had notice of defendant's equity, as to a reconveyance of the land, before it made its contract with the Chemical Company, and was not a purchaser without notice. It was accordingly decreed by the Court that while the complainant had an equity for the reformation of the deed as prayed in the amended bill, the defandant had a prior equity to have the land reconveyed to it on the termination of the contract between the Shelby Chemical Company and the Shelby Iron Company, which contract had been terminated by the bankruptcy of the Shelby Chemical Company and its subsequent inability to perform the contract, but that complainant was entitled to remove from the lands

all the buildings and equipment constituting the chemical plant and that complainant should have six months from the date of the decree within which to make such removal. The opinion of the court and its decree are found on pages 59 to 73, inclusive, of the transcript.

Propositions of Law.

I.

The deeds of June 11th and June 18, 1918, did not operate to convey the legal title to Shelby Chemical Company. There being no latent ambiguity on the face of the deeds, parol evidence would not be admissible in a court of law, or even in a court of equity (except on bill to reform), to show that the deeds were really executed by Shelby Iron Company of New Jersey instead of by the Shelby Iron Company of Alabama, as they purport to be.

Pitts *v.* Brown, 49 Vt., 86; 24 Amer. Rep., 114.
Crawford *v.* Spencer, 8 Cush. (Mass.), 418.
22 C. J. 1194 and Cases Cited in Notes.
Bradley *v.* Washington Steam P. Co., 13 Pet., 89; 10 L. Ed., 72.

II.

But even if such deeds did operate to convey the legal title, in either aspect of the present case, whether considered as a bill to quiet title or as a bill to reform, it was the duty of the court to determine whether the

defendant had any title to, interest in, or claim upon the land.

Jenkins *v.* Jonas Schwab Co., 138 Ala., 664.
Pace *v.* Robertson Banking Co., 202 Ala., 343.
Weaver *v.* Eaton, 139 Ala., 247.
Coburn *v.* Coke, 193 Ala., 364.
Kelly *v.* Coke, 193 Ala., 271.
Interstate Bldg. & Loan Ass'n *v.* Stocks, 124 Ala., 109.

III.

The right of a party seeking reformation of a deed must rest on an equity superior to that of him against whom it is sought. The power is exercised with great caution and in the absence of definite allegations and certain proof that there is an existing superior equity, the remedy is not authorized.

Keith *v.* Woodruff, 136 Ala., 443.
Teakle *v.* Teakle, 29 Ala., 403.
34 Cyc. 905 and Cases Cited in Note.

IV.

The remedy by suit in equity to reform a written instrument is not absolute. It is discretionary with the court whether under all the circumstances the remedy is necessary to complete the ends of justice.

34 Cyc. 907 and Cases Cited in Note.

V.

When the United States comes into court to enforce its rights, it comes as any other suitor and the courts

decide on the rights of a citizen in controversy with the Government according to equity and good conscience between citizens. The ordinary rules prevail as in actions between private individuals.

Rhode Island *v.* Mass., 12 Pet., 657; 9 L. Ed., 1233.

Brent *v.* Banks, 10 Pet., 596; 9 L. Ed., 547.

Mitchell *v.* U. S., 9 Pet., 711; 9 L. Ed., 283.

U. S. *v.* Castillero, 2 Black, 17; 17 L. Ed., 360.

U. S. *v.* Arrendondo, 6 Peters, 691; 8 L. Ed., 547.

Smoots Case, 15 Wall., 36; 21 L. Ed., 107.

U. S. *v.* State Bank, U. S., 30; 24 L. Ed., 647.

Aldrich *v.* Chemical National Bank, 176 U. S., 618.

Leary *v.* U. S., 14 Wall., 607; 20 L. Ed., 756.

VI.

The law imputes knowledge when opportunity and interest, coupled with reasonable care, would necessarily impart it, and whatever is notice enough to excite attention and put the party on his guard and call for inquiry is notice of everything to which such inquiry might have led.

Woolersak *v.* Reiger, 115 U. S., 96; 29 L. Ed., 350.

Wood *v.* Carpenter, 101 U. S., 135; 25 L. Ed., 807.

McQuiddy *v.* Ware, 20 Wall., 14, 22; L. Ed., 311.

Livingston *v.* Maryland Ins. Co., 7 Cranch, 506; 3 L. Ed., 421.

Simons Creek Coal Co. *v.* Doran, 143 U. S., 417.

VII.

It is a general rule that a paper which expressly refers to another paper within the power of the party, gives notice of the contents of that other paper, and where inquiry is a duty whatever is sufficient to put one upon inquiry is sufficient to charge him with notice of what that inquiry would have led to.

Livingston *v.* Maryland Ins. Co., 7 Cranch, 506; 3 L. Ed., 421.

Brush *v.* Ware, 15 Pet., 93; 10 L. Ed., 672.

Goodman *v.* Simonds, 20 How., 343; 15 L. Ed., 934.

Angle *v.* Northwestern Mutual Life Ins. Co., 92 U. S., 330; 23 L. Ed., 556.

Martin *v.* Webb, 110 U. S., 7; 28 L. Ed., 49.

ARGUMENT.

No Misnomer in Deed.

No multiplication of authorities is necessary to support the principle asserted in proposition one above. It is entirely consistent with appellant's contention that a misnomer will not invalidate a grant to or by a corporation. It is not true, however, that in every case it can be shown by parol evidence that there was a mistake in the name of a grantor corporation. As we understand the rule, which is applicable to a case of this kind, where a question of the legal title to land is involved, such mistakes can be shown by parol only

where there is a latent ambiguity which appears on the face of the deed.

In the case of Crawford *v.* Spencer, 8 Cush. (Mass.), 418, it was held that on the trial of a writ of entry for recovery of land, it was not permissible to show that the name of James Maxwell Crawford was inserted in the deed by the grantee by mistake and that the intention of the parties was to convey the land to George Crawford, who paid the purchase money and went into possession. The Court uses the following language:

> "Here is a plain grant to the defendant and no fraud in the execution of it is suggested. Nor does any extrinsic fact raise a latent ambiguity as to the true grantee, so as to admit explanatory parol evidence. The testimony which was offered merely shows a mistake, which the court has no authority in any way to correct. The premises passed to the defendant by force of the deed and evidence to combat the deed or to control its effect was rightly rejected."

In the case of Pitts *vs.* Brown, 49 Vt., 86; 24 Am. Rep., 114 it was held not to be permissible in an action of ejectment to show that a deed to Rufus Vallett was really made to Russell Vallett and that writing the name of Rufus in the deed was a clerical error. The court said that such evidence would in its legal effect operate to reform the deed, which was not allowable in a court of law. The court says:

> "There is no ambiguity apparent upon the face of the deed. Where a latent ambiguity exists, it is sometimes allowable to explain it by

> parol, as, in the case of a will, to ascertain the person where there are two of the same name, Lord Cheney's case, 5 Co., 468; A. Ulrich *vs.* Litchfield, 2 Atk., 372; Parsons *v.* Parsons, 12 Ves., 266; Thomas *v.* Thomas, 6 Tenn., 671. And a grant may be good though the grantee's name of baptism be a mistake (Coke Litt., 3*a*) as, where lands were given to Robert, Earl of Pembroke, when his name was Henry, the grant was held good, because there could be but one of that name and dignity. The old rule was that in the case of deeds or grants an omission or mistake of the Christian name of the grantee rendered the grant void. The exceptions to that rule were, when, from the deed or grant, with the aid of extrinsic evidence, it could be ascertained with certainty what was meant or intended, and in this class of cases, resort must be had to a court of equity for reformation of the deed or grant."

In the present case we have no "misnomer" of a corporation. If the deed had used the name of Shelby Iron Company of Alabama, when in fact there was no such corporation as the Shelby Iron Company of Alabama, but there was a corporation by the name of Shelby Iron Company organized under the laws of New Jersey, it would be permissible to show the real facts because it would involve no contradiction of the deed. Here, however, if appellant's contention is right, the court would be justified in an action at law in admitting testimony to show that, although the deed purported on its face to be made by the Alabama corporation, it was in fact made by the New Jersey corporation. Prac-

tically all of the cases cited in appellant's brief are perfectly consistent with the rule which we are insisting upon.

In the case of Wakefield *v.* Brown, 38 Minn., 361, there was a latent ambiguity in the deed, the property involved having been conveyed by John O. Bremius under the name of James O. Bremius, this name having been used in the body of the deed. It did not appear that there was any such person as Jas. O. Bremius and it was held competent to show that the grantor executed it under the assumed name of James O. Bremius or that the scrivener made a mistake in the Christian name of the grantor who signed the deed as J. O. Bremius. This involved no contradiction of the deed. On precisely the same theory the cases of Fallon *vs.* Kehpe, 38 California, 44; Hommell *v.* Devering, 39 Mich., 522, and other cases cited in appellant's brief were decided. On this point, however, it should suffice to say that appellant by its amended bill alleged that the deed was executed, not by the Shelby Iron Company of New Jersey, but by the Shelby Iron Company of Alabama, that it was so made by mistake and a reformation of the instrument was prayed for. We submit that appellant cannot now be heard to say in opposition to the averment of its bill that the deed was not in fact made by the Shelby Iron Company of Alabama, but was in fact made by the Shelby Iron Company of New Jersey.

SECOND

Duty of Court to Ascertain Defendant's Interest.

But even if the deeds were sufficient to convey the legal title to the Shelby Chemical Company, yet, nevertheless, whether the bill be considered as one to quiet title or as one to reform the two deeds, it was the duty of the Court below to determine whether, in the one aspect, the defendant had any right, title, interest or claim to the land and in the other aspects whether it had an equity superior to that of complainant.

In the case of Jenkins *vs.* Jonas Schwab Company, 138 Ala., 664, it was held that the statute with reference to quieting title gives a remedy for the determination of every claim of interest adverse to the ownership of the one filing the bill. The same doctrine is asserted in the case of Weaver *vs.* Eaton, 139 Ala., 247, and in Pace *vs.* Robertson Banking Co., 202 Ala., 343.

Under the other aspect of the bill, viz, that of reformation, it is well settled by the authorities that the right of a party seeking reformation must rest on an equity superior to that of him against whom it is sought. 34 Cyc., 905 and cases cited in note. This is but another statement of the doctrine that he who seeks equity must do equity and that when a court of equity takes charge of a case it is its duty to determine all of the equities as between the parties and to enter such a decree as the justice of the case may demand.

We turn next to the consideration of what interest, claim or title the defendant may have in the land and what equity it may have in respect of having the land conveyed back to it. In the contract between the defendant and the Chemical Company it was stipulated that the defendant should convey to the Chemical Company sufficient ground on which to construct the plant and buildings that were to be erected and this language is used in reference to the conveyance of the land to the Government: "Inasmuch as the United States Government will be financially interested in the construction of the Chemical Company's plant, it is expressly agreed that said real estate may be deeded to and vested in the United States Government *during the period of a contract between the Chemical Company and the United States Government, said contract to extend for the duration of the war.*" (Italics ours.) See transcript, page 16. It was further provided in that contract that upon its termination the Chemical Company would reconvey to the defendant all of the lands free and clear of any encumbrances or liens whatsoever. (Tr., p. 17.) It is perfectly clear, therefore, that the contract contemplated that the title to the property should be vested in the United States for a period only, which was not to extend beyond the duration of the war. It is also perfectly clear that upon the termination of the contract, which by its terms was to expire April 1, 1923, or at the end of a five-year renewal period thereafter, the defendant would have the right as against the Chemical Company to require a reconvey-

ance to it of the land. We submit, furthermore, that there can be no question that as between the defendant and the Chemical Company the former did have a right to such reconveyance before April 1, 1923, if by reason of bankruptcy of the Chemical Company or other cause it had become disabled on its part from carrying out the terms of the contract, thereby bringing about precisely such a termination as would have resulted if the contract had been performed up to April 1, 1923. Pretermitting for the moment the question as to whether complainant had notice of this equity on the part of the defendant, let us consider whether the Chemical Company had any right to a reconveyance of the land after the termination of the war. In the last paragraph of Article VII of the contract between complainant and the Chemical Company (Tr., p. 25) the following provision is found:

> "It is agreed, however, that in case the Government takes over said plant *or* undertakes to operate it by reason of default of the contractor *or for any other reason*, the Government's rights to operate the same shall, except as may be expressly provided by statute, cease and terminate at the end of the present war. If at that time the sale of said plant to the contractor shall have been consummated, the Government will surrender possession thereof to the contractor and if said plant is then still owned by the Government it shall at its own expense within six months from the end of said war remove all buildings and equipment constituting such plant from the ground upon which the same are

> erected and shall without further consideration reconvey such ground to the contractor." (Italics are ours.)

It will be seen that the agreement of the Government to reconvey the land is not conditioned upon its taking over the plant *and* undertaking to operate it. The words are that if it takes over the plant or undertakes to operate it. And the further provision is, that if at the end of the war the plant is still owned by the Government, it shall remove the buildings and equipment and reconvey the ground to the contractor. As has already been seen, this provision was inserted at the instance of the defendant. It would not enter into the contract with the Chemical Company until such provision was inserted into the contract between the Government and the Chemical Company. It is perfectly plain, therefore, that the Chemical Company had a right to require a reconveyance of the land to it upon the termination of the war. It is likewise perfectly plain that if the Government had notice of the rights of the defendant under its contract with the Chemical Company, it could not by any subsequent agreement with the Chemical Company, as against the defendant, abrogate and annul the provision requiring a reconveyance of the land to the Chemical Company, particularly in view of the fact that it was recited in the contract between the Chemical Company and the defendant that the real estate should be "deeded to and vested in the United States Government during the period of a contract made between the Chemical

Company and the United States Government, *said contract to extend for the duration of the war.* (Our italics.) (Tr., p. 16.) The further provision in the last-mentioned contract to the effect that the Chemical Company was to become the owner of the land, buildings, equipment and improvements if an enabling statute to that effect should be passed by the Congress of the United States has become inoperative for the reason that such an enabling statute was passed.

This provision was inserted for the benefit of the Chemical Company merely and was, no doubt, intended to operate mainly with reference to the plant and improvements on the land, relieving the Chemical Company from liability to convey, if it was not in its power to do so. Certainly, it was never intended thereby to enlarge the rights of the Government so as to enable it to acquire the land for any period beyond the duration of the war. The apparent inconsistency, in the Government's contract with the Chemical Company, between the provision that the Government was to acquire a good title to the land and the further provision that the land was to be reconveyed to the Chemical Company at the end of the war, is explainable on the theory that the last-mentioned provision was inserted after the contract had been prepared at the demand of the Iron Company. It will be noted that in the contract between the Government and the Chemical Company it is recited that the obligation of the Government to sell the plant to the Chemical Company is conditioned upon its having the legal authority to make such sale and conveyance. As well

said in the opinion of the District Court: "Reading the contracts together, it can be deduced that the plaintiff and defendant and the Chemical Company fully understood that the Government was to retain title to the land only for the purpose of and during the period of operation of the plant for it or by it and that the contractor was to retain title to the land only during the period of the existence of an operating contract between it and the defendant. For the purpose of securing reimbursement for advances made the Chemical Company, the Government looked not to ownership of the land but to the reserved right of removing the plant within six months after operations had ceased, agreeing then to reconvey the land to the contractor without regard to the state of their mutual accounts. In no event was it contemplated that the Government would continue to own the lands after its right to operate or have operated the plant had ceased." (Tr., p. 76.)

THIRD.

Government Had Notice of Defendant's Rights.

We now come to consider whether the complainant, the United States Government, had notice of the rights of defendant under its contract with the Chemical Company. It has been settled by many decisions of the Supreme Court of the United States that when the United States comes into court to enforce its rights, it comes as any other suitor and the courts

decide on the rights of a citizen in controversy with the Government according to equity and good conscience between citizens. The ordinary rules prevail as in actions between private individuals. The doctrine is thus laid down in 26 R. C. L., 1437:

> "In the construction and interpretation of Government contracts, the same general rules apply as in the case of contracts between individuals. The fact that the Government is a party is not material so far as this rule is concerned. The rights of the parties should be governed by the terms of the written agreement, the express and unambiguous stipulations of which cannot be varied by parol. Such a contract should be construed with a view to ascertain the intention of the parties and to give effect accordingly, if that can be done consistently with the terms of the instrument. Where the language of a contract is susceptible of two meanings, the meaning of the parties may be explained by the circumstances attending the transaction. The courts may look not only to the language employed but to the subject matter and the surrounding circumstances and may avail themselves of the same light which the parties possess when the contract was made."

In the case of Brent *v.* The Bank of Washington, 10 Peters, 596; 9 L. Ed., 547, the court uses this language:

> "Thus compelled to come into equity, for a remedy to enforce a legal right, the United States must come as other suitors seeking in

> the administration of the law of equity, relief; to give which, courts of law are wholly incompetent, on account of the legal bar interposed by the bank. This court, in The United States *v.* Mitchell (9 Peters, 743), have recognized the principle in the common law that though the law gives the king a better or more convenient remedy, he has no better right in court than the subject through whom the property claimed comes to his hands. This principle is also carried into all the statutes, by which the appropriate courts are authorized to decide, and under which they do decide on the rights of a subject in a controversy with the king, according to equity and good conscience between subject and subject."

In the case of United States *v.* Arrendondo, 6 Peters, 691; 8 L. Ed., 547, this language is used:

> "The United States by consenting to be sued and submitting the decision to judicial action, have considered the controversy as a purely judicial question, which must be decided as between man and man, on the same subject matter, and by the rules which Congress themselves have prescribed."

In U. S. *v.* State Bank, 96 U. S., 30; 24 L. Ed., 647, it was held:

> "Where the money or property of an innocent person has gone into the coffers of the nation by means of a fraud to which its agent was a party, such money or property cannot be held by the United States against the claim of

> the wronged or injured party. The agent was agent for no such purpose. His doings were vitiated by the underlying dishonesty; and could confer no rights upon the principal. The rules of law applicable to individuals in such cases apply also to the United States."

If this controversy were between individuals, could there be any doubt that ordinary prudence would have required the individual making such a contract with the Chemical Company to inquire into the terms of the contract between the Chemical Company and another party under which the wood, steam, water, electricity and the land itself were to be furnished? The law imputes notice when opportunity and interest, coupled with reasonable care, would necessarily impart it, and whatever is notice enough to excite attention and put the party on his guard and call for inquiry is notice of everything to which such inquiry might have led. Cases cited under proposition VI above. As said in the lower court's opinion:

> "It is inconceivable that the plaintiff would have agreed to finance the Chemical Company in the construction of its plant to the extent of $400,000.00 unless and until it knew that the terms of the contract between the Iron Company and Chemical Company was such as to insure a successful operation by the Chemical Company. This could only have been determined through an inspection of the contract between the Iron Company and the Chemical Company."

Inspection of that contract would have shown that the land was to be conveyed by the Chemical Company to the Government for the duration of the war only, and would have further shown that the Chemical Company was to reconvey the land to the Iron Company on the termination of its contract with that company. It is a general rule that a paper which expressly refers to another paper, within the power of the party, gives notice of the contents of that other paper. Livingston *v.* Maryland Insurance Co., 7 Cranch, 506; 3 L. Ed., 421. It is generally held, moreover, that where inquiry is a duty whatever is sufficient to put one upon inquiry is sufficient to charge him with notice of what that inquiry would have led to. There can be no sort of doubt that reasonable, ordinary care would have required the officer who made the contract with the Chemical Company to make inquiry into the terms and provisions of the contract between the Chemical Company and the Iron Company. That he had notice that there was such a contract appears from this recital in the contract between the Chemical Company and the Government: "Whereas the contractor has a contract with the Shelby Iron Company of Shelby, Alabama, according to the terms of which the Shelby Chemical Company shall receive all the lumber it may require from timber lands owned and leased by the Shelby Iron Company in return for all charcoal derived therefrom." (Tr., p. 19.) That officer must be presumed to have exercised due and ordinary care in the premises and to have examined the provisions of the contract between the

Chemical Company and the Iron Company, upon which the success of the Government's undertaking so largely depended. He must have made inquiry, not only as to the cost of the plant itself but as to how the Chemical Company was to obtain, not only the wood but the water, steam, electricity and shipping facilities, which were necessary for the operation of the plant, as well as with respect to the land upon which the plant was to be located. Moreover, this officer has not denied that he did have notice of all of the terms and provisions of that contract between the Chemical Company and the Iron Company. That the officer did have such notice must be regarded as an accepted fact. Notice to him was notice to the Government. He was the officer designated by the President under the National Defense Act to enter into such contract in behalf of the Government. It is so recited in the Government contract and there has been no denial of the fact by anyone. It is not sought here to charge the Government with laches or neglect on the part of its agents or officials. The question is one of imputed notice. If the officer had full authority to make the contract he was the representative of the Government and its *alter ego* in that behalf and notice to him was notice to the Government.

Under the law the President had the right by executive order to authorize contracts to be made without advertising for proposals. The contract itself between the Government and the Chemical Company recites that it was a contract made by the United States of America "represented by A. C. Downey, Major Sig-

nal Corps, United States Army, hereinafter referred to as the Contracting Officer, acting by the authority of the Chief Signal Officer of the United States Army and under the direction of the Secretary of War." The contract further recites that it is made pursuant to the provisions of the law therein referred to and states in terms that "the President hereby places the following order with the Contractor," etc. Thereafter the Government proceeded with the execution of the contract by paying money thereon and receiving benefits therefrom and the Government will not now be heard to say that the contract was not duly authorized and was not executed by the proper officer. By the stipulation made in open court, it was admitted that the contract was duly and properly executed, which means that it was executed by the proper officer of the Government.

Without adding anything further upon the question of notice which as we submit is fully proven, we content ourselves with a reference to the opinion of the district court (Tr., p. 74) and the opinion of the circuit court of appeals (Tr., p. 83), both of those courts having found that the evidence established the fact that the Government had notice of defendant's equity. This Court will accept such successive findings as final.

Stuart vs. Hayden, 169 U. S., 1.

Baker vs. Cummings, 169 U. S., 198.

Towson vs. Moore, 173 U. S., 24.

Wright-Blodgett Company vs. U. S., 236 U. S., 402.

Washington Securities Company vs. U. S., 234 U. S., 78.

FOURTH.

Equity of Government Not Superior.

In view of what has already been said, it is hardly necessary, we think, to give much consideration to the point much stressed by the Government in the courts below that the equity of the Government was superior to that of the defendant. Let us briefly consider the matter, however, and see what the situation of the parties was. The Government, under the stress of war conditions, is in urgent need of acetate of lime and methyl alcohol. It finds the Shelby Chemical Company willing to enter into the manufacture of these commodities and to erect a plant for their manufacture, if the Government will furnish the money for the erection of the plant. The parties will make an estimate of what such a plant will cost and find it to be, under war-time conditions, about four hundred thousand dollars. But, besides the erection of the plant it is necessary to have land upon which to erect it, as well as a supply of dry wood and water, steam, electricity and switching facilities. The Iron Company is willing to furnish those other requisites if charcoal, one of the by-products, is furnished to it for its iron furnaces. It is willing to expend and does expend the sum of fifty thousand dollars in order to put itself into a position to supply these necessary requisites for the making of the lime and alcohol. The sole benefit to accrue to the Iron Company is the charcoal, which is agreed to be furnished to it. Necessarily, the Iron

Company must have some protection, if it is to convey the land and make such large expenditures, against a possibility of the land being transferred or conveyed to other parties who would be under no obligations to give it the charcoal. The plant of the Chemical Company is to be so combined and intertwined with that of the Iron Company that it must have protection against the possibility that the title to the land and the plant might pass to others with whom the Iron Company would have no contract relations and from which it could make no demand that the charcoal product should be furnished to it. It realized, no doubt, that it would be difficult enough to work harmoniously even with the Shelby Chemical Company with the plants commingled as they were, but it was willing to take that risk in order that the Government might be furnished with things that were needed for the carrying on of the war. To guard against such an impossible and unworkable condition as would arise if the ownership of the chemical plant should be in the Government after the war had ended or should pass from the Government into other hands, it was expressly provided in the contract, that while the Iron Company was to furnish the land, which could be conveyed to the Government, such conveyance was to be made for the duration of the war only and at the end of the war if the Government still owned the plant it should convey the title back to the Chemical Company and remove the plant therefrom within six months thereafter.

Obviously the removal of the plant from the land was deemed by the Government a sufficient provision

to protect its interest. That the Government should have the right to convey away the land to a third party after the end of the war was never contemplated for a moment, and on the contrary the right to do so is absolutely repelled and denied by the provisions of the two contracts above adverted to. For the reasons already urged, the Government had full notice of the rights of the Iron Company in respect to the land after the war should have terminated. The Government knew that the Iron Company was furnishing the land and that it was to furnish other things of great value, that the only benefit to be derived by it was the charcoal to be made, that it could not require such charcoal to be furnished to it by the Government itself, if it should take over the operation of the plant, or by any other party to whom the land and plant might be conveyed. The Government knew that the only protection that the Iron Company had against such an unhappy situation was the provision that the Government was to convey the land back to the Chemical Company with which the Iron Company did have a contract under which its rights could be protected. The provision in the contract between the Chemical Company and the Iron Company that the former was not to be obligated to convey the land back to the Iron Company except in the event it had acquired the title thereto from the Government was intended for the protection of the Chemical Company and must have had reference mainly to the Chemical Company's acquiring the ownership of the plant, although not very aptly expressed to that end. But certainly the Government had

no right to avail itself of that provision, or, in other words, to take advantage of its own wrong by refusing to convey the lands back to the Chemical Company, as it had obligated itself to do, and refuse to give any force and effect to the provision that the ground was to be deeded to it for the duration of the war only. To sum up the matter in a very few words: It was absolutely necessary for the protection of the Iron Company that the land should be conveyed back to the Chemical Company at the end of the war. That was the necessary thing to be done as was contemplated by all of the parties at the time the first contracts were made. The only protection that the Government required and the only one demanded by it was that it should have the right to remove the plant and machinery and equipment from the land, having six months within which to do so. Where is there any room then for the contention that the equity of the Government is superior to that of the Iron Company? We respectfully submit that there is none.

FIFTH.

Government Not Purchaser for Value.

If under the pleadings it had been competent for the Government to show that it was a bona fide purchaser for value, the question of notice would be the controlling one.

We shall undertake to show, however, that under the pleadings as framed and as the case was submitted to the lower court that defense was not available to the

Government as against the Iron Company's cross-bill or cross-claim. It is well settled that in equity the claim of a *bona fide* purchaser for value is an affirmative defense which must be pleaded.

In 2nd Pom. Eq. Jur. (4th Ed.), section 784, it is said, referring to the defense of a *bona fide* purchase and the necessity for pleading it: "If he neglects to put in a plea and fails to assert the defense in his answer, he cannot raise it or avail himself of it at any subsequent stage of the suit." To the same effect are Hanchey *vs.* Hurley, 129 Ala., 306; Kelly *vs.* Chandler, 184 Ala., 358; Wood *vs.* Holly Manufacturing Co., 100 Ala., 350.

In the case of Hooper *vs.* Strahan, 71 Ala., 65, it is said of a party claiming to be a *bona fide* purchaser: "In no appropriate manner does he bring before the court the claim of a *bona fide* purchaser without notice and his rights as such must be considered as eliminated from the case."

The following rules as to defense of *bona fide* purchase are set out and quoted with approval in the case of Wood *vs.* Holly Manufacturing Company, supra:

> "The rule is settled in this State, that in such cases (defense of *bona fide* purchase) it is required of a defendant, who is sub-purchaser, to aver in his plea or answer, clearly, distinctly and without equivocation, and with proper circumstantiality of detail, the following facts, (1st) that he is a purchaser from one in actual or constructive possession, who was seized or claimed to be seized of the legal title, at the same time briefly setting out substantially the

> contents of the deed of purchase, with date, consideration and parties; (2) that he purchased in good faith; (3rd) that he parted with value, paying money or other valuable thing, assuming a liability, or incurring an injury, stating the nature of the consideration fully; (4th) that he had no notice of complainant's equity, and knew of no fact calculated to put him on inquiry, either at the time of the purchase, or at or before the time he parted with the consideration."

In the case of Great Northern Railway Co. *vs.* Hower, 236 U. S., 702, 59; L. Ed., 798, the court uses the following language in reference to this kind of a defense: "*Bona fide* purchase is an affirmative defense which the grantee must set up in order to defeat the right of the railroad company to have a trust declared in the lands in question, if the bill is otherwise sufficient for that purpose. This matter was directly involved and considered in Wright-Blodgett Co. *vs.* United States, 236 U. S., 397, and it is only necessary in this connection to refer to that case." In the case of Wright-Blodgett Co. *vs.* United States, 236 U. S., 397, 59 L. Ed., 637, the court says that the rule as to this defense is thus stated in Boone *vs.* Chiles, 10 Pet., 177:

> "In setting it up by plea or answer, it must state the deed of purchase, the date, parties, and contents briefly; that the vendor was seized in fee, and in possession; that the consideration must be stated, with a distinct averment that it was *bona fide* and truly paid, independently

> of the recital in the deed. Notice must be denied previous to and down to the time of paying the money, and the delivery of the deed; and if notice is specially charged, the denial must be of all circumstances referred to, from which notice can be inferred; and the answer or plea must show how the grantor acquired title. * * * The title purchased must be apparently perfect, good at law, a vested estate in fee-simple. * * * It must be by a regular conveyance; for the purchaser of an equitable title holds it subject to the equities upon it in the hands of the vendor, and has no better standing in a court of equity. * * * Such is the case which must be stated to give a defendant the benefit of an answer or plea of an innocent purchaser without notice, the case stated must be made out; *evidence will not be permitted to be given of any other matter not set out.*" (Our italics.)

There are many cases cited in the opinion as sustaining these rules and among other authorities cited is that of 2nd Pom. Ed. Jur., ***supra.***

We may regard it as well settled in the Federal courts, at least, that no one may avail himself of the defense of *bona fide* purchase without setting up the same in his answer and that the averments of such defense must be as full and as explicit as are stated in the opinion of the court last cited.

In this case, the equity of defendant to have the land re-conveyed to it was set up in the answer and was available to it under such answer, considered as an answer merely, and was likewise available to it under

its answer treated as a cross-claim or cross-bill. In the Government's answer to the cross-claim or cross-bill, which is termed a replication, there is not a hint or a suggestion that the Government was a *bona fide* purchaser for value without notice of defendant's equity. No evidence would have been available, therefore, to the Government to show that it was such *bona fide* purchaser, even if it had been offered. And if such evidence had been given it could not have helped the case of the Government, because, as said by the Supreme Court of Alabama, evidence without proper allegations is as unavailing as allegations without proof. But in point of fact, no such evidence was offered. No witness testified that the Government paid anything of value to the Shelby Chemical Company as a consideration for the deed made to it by the Shelby Chemical Company. Clearly, the recitals in the contracts between the Government and the Chemical Company are not evidence as against the Iron Company of the truth of such recitals. Neither is the recital in the deed from the Chemical Company to the Government, of one dollar in hand paid and other good and valuable considerations to the grantor paid, evidence against the Iron Company that any such consideration was in fact paid. It is so held in the case of Simmons Creek Coal Co. *v.* Doran, 142 U. S., 417; 35 L. Ed., 1063, where it is laid down that in an action to set aside deeds as a cloud on plaintiff's title the recitals in such deeds are not as against plaintiff proof of the payment of the purchase money. This principle is so well settled that no other citation of authorities on this

point is necessary. It follows then that as there was neither allegation nor proof that the Government was a *bona fide* purchaser for value of the land in controversy the proven equity of the Iron Company stands unrebutted.

Conclusion.

In the brief for appellant in the court below there were many imputations upon the honesty and fairness of the Iron Company and direct charges to the effect that that company was actuated by greed and a desire to speculate upon the necessities of the Government and that it is seeking to buy the plant at its own price. Little need be said in reply to these insinuations and charges because they are absolutely unsupported by a single word in the testimony. So long as negotiations were pending between Dow and his associates for the purchase of the Iron Company, it being contemplated that they would also purchase the Chemical Company's plant, the Iron Company was not interested in the chemical plant. But when it finally became apparent that Dow and associates would be unable to carry out their agreement with the Iron Company to purchase its plant, the President of the Iron Company went to Washington and, before any contract had been made by the Government for the sale of the plant, he offered to pay for it two hundred and ten thousand dollars in cash, which was the same amount for which it was afterwards sold to the Bon Air Coal and Iron Company—but whether the amount so to be paid by the Bon Air Company was to be paid in cash or what se-

curity the Government had for such payment, it is not made to appear. It was also claimed that the Iron Company was not only estopped but that it did not offer to do equity and did not come into a court of equity with clean hands. In the ninth paragraph of the Iron Company's answer and cross-claim is found the following: "Defendant hereby offers to do equity by purchasing said plant from the plaintiff at its fair and reasonable value or by allowing the plaintiff to remove said plant from the premises of defendant within a reasonable time to be fixed by the Court and to do and perform whatever else in equity and good conscience it ought to do to entitle it to the relief hereinafter prayed." To use a familiar phrase, comment would seem to be unnecessary. But in the light of this offer on the part of defendant, how can it be claimed that the Iron Company is seeking to take advantage of the Government and get the property at its own price? Further, how can it be claimed that the Government will sustain a great loss if the plant is to be removed from the land when the Government for its own protection inserted that provision in the contract? And where is there any evidence to show that the Government would sustain any loss by the removal of the plant and machinery and equipment? Certainly the Government had the right to insist upon the fulfillment of that condition of the contract and it could not be required against its will to sell the plant to the Iron Company. The latter by its answer and cross-bill offered to pay the reasonable value of the plant. The Government

did not close in with this offer and the court had no right to compel it to do so. The right reserved to it by the contract was to remove the plant and this right was given to it by the decree of the Court below. From any point of view, we respectfully submit that the decree of the Court below was correct and should be affirmed.

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